IN THE

Supreme Court of the United States

No. 3, ORIGINAL

OCTOBER TERM, 1922

THE STATE OF WYOMING,
Complainant,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, and THE LARAMIE POUDRE RESERVOIRS AND IRRIGATION COMPANY,
Defendants.

Application by Complainants for leave to file Brief in answer to the Motion and Brief by the Defendants for rehearing

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WILLIAM L. WALLS,
Attorney General of the
State of Wyoming.

JOHN D. CLARK,
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To the Honorable Judges of the Supreme Court of the United States:

The State of Wyoming respectfully moves the Court for leave to file a brief on its behalf in opposition to the application by the defendants for rehearing, and the brief of the defendants thereon, and complainant

now presents with this application the brief which it asks it be allowed to file.

Respectfully submitted,

THE STATE OF WYOMING,

By WILLIAM L. WALLS

Her Attorney General.

JOHN D. CLARK,
N. E. CORTHELL,
HERBERT V. LACEY,
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IN EQUITY

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Defendants.

Brief of the Complainant in opposition to the Petition for rehearing

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The State of Wyoming respectfully makes the suggestions herein in opposition to the petition for rehearing. In presenting the suggestions the complainant, well realizes the importance of the matters involved in the decision heretofore made in said cause and in the decree entered. The complainant is not unmindful of the fact that the State of Colorado is a defendant and that application has been made on behalf of the State of Utah to allow that State to intervene as a friend of the Court, nor does the complainant seek in the least to minimize the respect which should everywhere be given to the status and requests of one of the States of the Union.

It might not be amiss to suggest, however, that this cause was begun May 29, 1911, after leave of this Court had been obtained therefor. During the period of more than eleven years that intervened between the beginning of the cause and the final decision and decree the questions of law involved were first argued on a demurrer to the bill of complaint. After the answers were filed and the evidence taken the matter came on for hearing upon the merits before this Court. On three several occasions, with long intervals between, every question of law and fact was argued before this Court. At each of these separate arguments, this Court, largely because of the fact that the States were here contesting, and also to some extent in recognition of the importance of the issues involved, allowed to each of the parties liberal extensions of the time usually alloted for argument. The Court not only gave to the parties formal suggestions by the Court itself as to the questions that should be discussed on the second argument, and, of course, upon the third, but at each of the hearings, by interrogatories propounded by the members of the Court, informed the parties and their counsel very fully of the queries that the case raised in the mind of the Court and in the minds of its members.

During all of this time the State of Utah, which now seeks to come in as a friend of the Court, was entirely silent. On her appearance now it is not claimed by the State of Utah that any question of fact involved affects any interest of the State of Utah in the slightest degree, nor could such claim be made because all of the waters involved in this case arise many miles from Utah and do not anywhere touch that State, but, on the contrary, from the point of origin flow always in a direction away from that State.

It results that the State of Utah is interested solely, if at all, in some question of law which it believes has been settled by the decision of this Court.

The defendants here, in their petition for rehearing, acquiesce in every matter of fact found by the Court, save only the fact as to the priority of certain appropriations. The contentions of the defendants, outside that one question of fact, relate to three matters only.

I. The claim that the Court should not only have decreed as to the diversion of waters from the Laramie River through the Tunnel, mentioned in the bill of complaint and the evidence, to the Poudre River, but also should have taken up and decided the question whether or not Colorado should be permitted to continue to divert the waters of Sand Creek, as Colorado has been doing.

II. It is claimed that the costs should not be assessed against the State of Colorado, as was done.

III. It is claimed that the doctrine of prior appropriation should not have been applied here, but that the doctrine of "equitable apportionment," as defined in the case of Kansas v. Colorado, should have been applied.

We shall speak of these in the order in which they are treated by the petition for rehearing.

I. Should the Court have adjudicated Sand Creek.

It is difficult to see how the omission of the decree to settle the rights in Sand Creek, if indeed that be an omission, is matter for just complaint by the defendants. The bill makes no complaint against the defendants for any diversion of the Sand Creek waters.

The matter complained of in the bill is the threatened diversion through the Tunnel. It might therefore be difficult for the Court to find in the bill any ground alleged upon which it could make an adjudication as to Sand Creek. Had it been thought by the defendants that the rights to the use of water, as water was being used in Sand Creek, should be determined here, then that question should have been brought forward by answer, if indeed that would have been germane.

The petition for rehearing cites very meagre references to the use of the waters of Sand Creek, that are found in the record and in the defendants briefs. Inspection of the places as pointed out, will show that the Wilson Supply Ditch diverts water from Deadman Creek into Sand Creek; that a ditch known as the Divide Ditch diverts the waters of the Wilson Supply Ditch and Sand Creek into a tributary of the Poudre. (record, Vol. I, Fols. 1398-9, 1617). There is a hint in the record that there are contractual rights between the different parties along the stream as to these Sand Creek waters. (Fol. 901). The record clearly shows, as is pointed out in the opinion of this Court, that the waters of Sand Creek are all used along the stream, so that as a practical question it does not now empty any of its waters into the Laramie directly or indirectly. (record, Fols. 894-896).

It is submitted that under the state of the record above pointed out there was no requirement that the Court should attempt to determine the right of the several parties, or of the two States, as to the use that was being made of the waters of Sand Creek.

II. The questions of priorities of appropriations.

Point 2 in the Petition for Re-hearing questions the decision of the Court in assigning to the Laramie Poudre Tunnel Project a priority date as of October, 1909, rather than of August, 1902, or some intermediate date not very definitely specified but suggestive of 1904.

As pointed out in the Petition (pp. 3-4) the evidence was most exhaustively reviewed and quoted, and the defendant's arguments set out in much detail in their original brief (Vol. II, pp. 138-188), and in their supplemental brief (Vol. II, pp. 113-140).

The subject was discussed at some lengths by the plaintiff in its original brief (pp. 21-25), and more especially in the Supplemental brief (pp. 42-73). The opinion of the court (pp. 29-34) much more consicely, but with remarkable comprehensiveness and exactness, deals with this contention, reviews the evidence and analyzes the claim of priority.

The Petition for Rehearing accepts the governing rule, announced by the Court in the opinion, that a completed appropriation is effective "from the time the purpose to make it was definitely formed and actual work thereon was begun, provided the work was carried on to completion with reasonable diligence."

It would seem that the defendants throughout their discussion of this subject mistake the scope and import of this rule. It involves three essentials:

1. A purpose definitely formed;
2. The beginning of its actual physical execution;
3. Completion with reasonable diligence.

Definition of the "purpose" imports a settled intention to take

(a) A defined quantity of water,
(b) From a designated source,
(c) By predetermined means and methods,
(d) For application to a specific use.

The "Actual Work" required has reference to such extent, source, means, end, and not to random work which may or may not ultimately serve the purpose in whole or in part. "Reasonable diligence" in prosecution imports continuity of purpose and effort adequately conceived and executed with a speed and means proportionate to the magnitude of the project.

A general discussion of this question would be simply a repetition of what has been already exhaustively discussed on both sides in the briefs and in argument. The defendants now suggest that the date of the alleged priority may be fixed either as of 1902 or of 1904, rather than of 1909. Brief extracts from the testimony of Charles H. Hedke, the witness chiefly relied upon on this point, will demonstrate that the project was still in the formative, not to say nebulous, period after 1904. He testified that

> "In 1905 and 1906 we considered almost every piece of property on Cache La Poudre River in connection with this system, and surveys were made in these computations. Lines of distribution, water supplies, lands to be irrigated, and how the system could be used in connection with other systems for distribution were considered; necessary surveys from reservoirs and lands, several of which went as far as the Crow Creek country east of the Union Pacific Railroad. Other work was done in connection with system at upper end

taking into consideration group of reservoirs then belonging to The North Poudre Irrigation Company and its relation to this system.

"This involved surveys for the different reservoirs (F. 1751) and computations were made as to capacity and cost of incorporating them into general system. Also investigated possible supply from Big Thompson and Boyd Lakes, to ascerta n possibility of utilizing this water by exchange methods with Cache la Poudre Valley and its system. * * * * As another example of work that took place during years 1905 and 1906, the matter of diverting water from Laramie River watershed into Cache la Poudre watershed was considered and investigation was made as to other means of diverting this water outside of the tunnel then surveyed and contemplated. Investigation was made to divert the same water by means of canal and other works of similar character, around the watershed to the north, extending into Wyoming and across the divide between the Poudre and the Laramie at a point known as Fish Creek Divide, near Tie Siding, in Wyoming. (F. 1752).

"In 1905 and 1906 surveys were made in connection with general project to verify wisdom of building tunnel. Investigations of every possible means of diverting water were carried on. Laramie River Reservoir was surveyed in connection with survey for purpose of ascertaining feasibility of diversion of water from Laramie River drainage through the reservoir and an outlet canal from it in place of tunnel and collecting ditches. Had this plan been feasible we could have eliminated all construction of mountain ditches and tunnels. It would have resulted in construction of reservoir in channel of river, collecting all water above it and supplying it into a canal below. (F. 1759.) * * *

"In 1908 another investigation of this means of obtaining water and avoiding building tunnel

was carried on. In that year a complete survey was made and George C. Anderson of Denver, a consulting engineer, was taken over the entire line and a report made. (1761). * * *

"Several different tunnel sites were considered and their relations to the collecting ditch system. Different elevations of the collecting system, different lengths of tunnel, different means of regulating water into tunnel and such investigations and computations as were necessary to weigh and balance the various propositions and find the one most economical and best suited for conditions of development, were considered and surveys made to ascertain the facts." (1765).

Without further repetition of the history of the project as narrated by this and other witnesses it is evident that neither the purpose of the diversion, the means of its execution, nor its object became fixed or definite until the tentative contract of September, 1909, with the Greeley Poudre Irrigation District became definitive and binding in October of that year. It would be quite accurate to say that from 1902 to 1909 the 'purpose' of the promoters and the real object of their interest and efforts was to find the best physical means and to secure the necessary financial means for transferring as much water as practicable from a general region of supply to a general region of demand.

One circumstance selected and put forward by the defendants in their petition for rehearing as showing final adoption of the Tunnel project, and constituting prosecution of that work with actual construction may be mentioned. We refer to the ditch from the West Fork to the East Fork of the Laramie River near the Tunnel site. On this subject we believe substantially the whole of the testimony is comprehended in the following extracts:

ZAC T. DUVALL, a witness for the defendants, testified that

"In addition to locating the inlet ditch from the West Fork to the West Portal of the tunnel, I constructed about 500 or 600 feet of the canal from the creek and turned water in from the West Fork of the Laramie River June 10, 1904.

"That was the first actual excavation work on any part of the Laramie River system. Water ran through that portion of the inlet ditch which we constructed from the West Fork. (1885). * * *

"The west end of the tunnel has been somewhat lowered from the survey I made, but I do not know how much. *As now constructed, it is designed to take water from the level of the stream opposite the upper end, whereas my survey required an intake ditch to get the water into the tunnel, some of this ditch being built the year I was there.* Water was run through it, but no use whatever was made of it. I do not think it was completed, and I do not know whether it is now a part of the present system. I do not know that any work was done on it since 1904." (1900)

WALACE A. LINK, another witness for the defendants, testified that

"All necessary clearing was done from West Fork of Laramie River for ditch across the East Fork of Laramie River and to tunnel. Considerable of ditch line was plowed and some of it finished so as to turn water into it from West Fork of River. Ditch required considerable clearing of timber at this point. Work was done on floor of Laramie Valley nearly level with west portal of tunnel. Upper end of this clearing was a point lower in elevation than what is now known as West Side Collection Ditch. It was so con-

structed that water flowing through this latter ditch as well as from Upper Rawah, would be carried across and into tunnel. First clearing in any part of the project was on East Fork Reservoir and the next clearing was on this ditch line from West Fork to the tunnel. (1954).

"First work of construction following any surveys on this entire mountain system, exclusive of road work, was done on East Fork Reservoir and also on line of ditch leading from West Fork of Laramie River to west portal of tunnel. (1959). * * *

"The first work along any surveyed line was done on East Fork Reservoir and on ditch leading from West Fork of Laramie River to the tunnel. I mean work of excavation done on the ditch the survey of which had been located and cross-sectioned by engineer. (1960). * * *

"No considerable amount was expended on the Lower Rawah or the West Side ditches nor on the tunnel or reservoir, but about $1,300 or $1,400 was expended on the East Fork Reservoir." (1989)

JOHN R. WORTHAM, another witness for the defendants, who was the engineer for the Greeley Poudre Irrigation District, and who described the works at great length and in much detail, prepared the map designated as Exhibit 1, and attached to the Answer of the defendant corporations. Some eighteen months were devoted to the preparation of this map, which according to the testimony of witnesses exhibits fully and accurately the works and means of diversion and distribution connected with the project. (1635).

From Folio 1635 to Folio 1699 the witness describes the details of the project. Neither in this description nor in the map does any reference to the ditch from the West Fork to the East Fork appear. On the contrary the map shows, and this is corroborated by all

of the other evidence on the subject, that such ditch is not a part of the project but that the water is taken directly from the river into the tunnel by means of a reservoir intercepting the water in the river below the junction of the two Forks. The changes in plan and method described by several of the witnesses entirely eliminated from the project this work which seems to be relied upon by the defendants as constituting the beginning of actual work upon the consolidated and "composite" project. If this were not so, the cessation of work from June, 1904, to November, 1909, was hardly consistent with "diligent prosecution" of the construction.

All of these matters as to priorities were very thoroughly and carefully discussed in two separate sets of briefs filed in behalf of the complainant, and in two separate sets of briefs filed on behalf of the defendants. They were also discussed at length by both parties in the oral argument. In addition to that the Court, as disclosed in the opinion, went into these matters very exhaustively. We cannot see that the defendants have, in their petition for rehearing, pointed out any matter bearing upon these priorities that has failed of full and mature consideration by the Court. In addition to that, as we feel we have above indicated, the evidence, when taken altogether, would not lend itself to any other conclusion than that reached by the Court.

III. Is the decision of the Court as to costs erroneous?

By the third paragraph of their Petition for a Rehearing the defendants ask the Court to modify its judgment to the end that the costs shall be equally

divided between the two states. It is a well established rule in suits in equity that the allowance or disallowance of costs depends largely on the facts and circumstances of each particular case, and rests entirely within the discretion of the Court, to be exercised upon principle and with reference to the general rules of practice and as equity may require. Prima facie the prevailing party is entitled to costs and it is incumbent upon the losing party to show the existence of circumstances sufficient to overcome the prima facie claim of the prevailing party. The defendants recognizing this rule, and that the plaintiff prevailed upon the main issue in the case, ask this Court to modify its judgment as to costs upon the grounds; (1) that the Court declined to enjoin the defendants from diverting the waters of the Laramie River from its watershed to the Poudre River; (2) that the Court decreed the right to Colorado to divert not more than 15,500 acre feet annually, which division was allowed upon the specific ground that this number of acre feet was an appropriation prior in time to all Wyoming appropriations exceeding in amount 272,500 acre feet; and (3) that the Court held it was encumbent upon Wyoming to make reasonable and adequate provision for the storage of the highflow of the river flowing into Wyoming from the State of Colorado.

But these rulings of the Court are only incidental to the main case. The suit was brought by the State of Wyoming for the principal purpose of enjoining the defendants from diverting the waters of the Laramie River to the injury of the citizens of Wyoming who had made prior appropriations thereof. The Court found that after allowing the recognized Colorado senior appropriations aggregating 22,500 acre feet, 18,000 acre feet of which are for waters known as the

Skyline Ditch, and 4,250 acre feet for the irrigation of that number of acres of native hay meadows in the Laramie Valley in Colorado, the available supply of water is 288,000 acre feet. The Court further found that the Wyoming appropriations having priority over the Laramie-Poudre project in Colorado, and dependent upon the available supply of 288,000 acre feet, cover 181,500 acres of land, and that the amount of water appropriated and reasonably required for the irrigation of these lands is 272,500 acre feet; and there remained 15,500 acre feet subject to the junior appropriation of the corporation defendants in Colorado. The decree of the Court is in conformity with these findings, and taken together it is indubitable that the plaintiff prevailed upon all the main issues in this action.

The allowance to the Colorado appropriators of 15,500 acre feet was incidental only to the judgment of the Court that under the law of appropriation, upon which the case was decided, the Wyoming appropriators were entitled by right of seniority to appropriate 272,500 acre feet of the flow of the river without interference from the Laramie-Poudre project. Further, that the decision on the merits of the case was in favor of the plaintiff and against the defendants, is tactitly admitted, and even urged, in all the defendant's arguments for a rehearing.

This being the state of the record, the following principles and authorities are applicable to this branch of the case:

> It is familiar doctrine that the allowance of costs in equity rests in the sound discretion of the Court, and, while it is of course true that the prevailing party is prima facie entitled to costs, the unsuccessful party may show circumstances to overcome this presumption. When both parties are

partly wrong the Court may refuse to allow costs to either. On appeal from equity, an allowance of costs is generally treated as final unless a palpable abuse of judicial discretion is shown.

Blassengame vs. Boyd, 178 Fed. 1,
S. C. 101 C. C. A. 128.

The plaintiff was awarded full costs in the court below, notwithstanding that, in the report of the master and in the final decree, he was awarded only nominal damages. It is insisted that this was error but as costs in equity and admiralty cases are within the sound discretion of the Court, we do not feel inclined to disturb this decree in awarding full costs to the plaintiff.

Dubois vs. Kirk, 158 U. S., 58.

In actions at law it is a general rule, that the losing parties, or the parties against whom judgment is rendered, are to pay the costs; and no apportionment of the costs is made between them. Each is liable for all, whatever may be their respective interests in thesubject matter of the suit. In equity it is different. There the Court has a discretion as to the costs, and may impose them all upon one party, or may divide them in such manner as it sees fit. We see no error in this particular in the judgment rendered for all costs against the defendant.

Kittredge vs. Race, 92 U. S., 120.

The allowance of costs is a matter not positively limited by law in equity cases, but they are allowed in the exercise of a sound discretion of the Court.

Canter vs. Insurance Co., 3 Peters, 307.
Keller vs. Bading, 169 Ill., 152.
Pile vs. Pedrick, 167 Pa, St., 296.

In equity and in admiralty the taxation of costs, as between the parties, is a matter of sound legal discretion, and for this reason it is said that generally an appeal will not lie alone from a decree taxing costs.

In re Michigan Cent. R. Co. 124 Fed. 727.
S. C. 59 C. C. A. 643.
The Scotland, 118 U. S. 519.

In equity, costs are awarded in the discretion of the Court, to either party, as justice may require; but the litigant who succeeds in equity is prima facie entitled to his costs; and the one who fails must show affirmatively some reason why costs should not be allowed against him.

Saunders vs. Frost, 5 Pickering, 259.
Waters vs. Gooch, 6 J. J. Marsh, (Ky.) 152.

A complainant in a suit in equity who shows himself entitled to some relief, although only part of the relief sought, is entitled to recover costs.

Butler vs. Triplett, 1 Dana 152.

In an equitable action it is the province of the Court to determine upon whom costs shall fall; and the exercise of such discretion will not be interfered with unless abused.

McGregor vs. Fitzpatrick 133 Ga. 332.
65 S. E. 859.
Cicero Lumber Co. vs. Cicero, 176 Ill. 9.
Blue vs. Blue, 38 Ill. 9.
Walling vs. Kinnard, 10 Tex. 508.
60 Am. Dec., 216.

IV. The rule of prior appropriation applied by the Court, as contrasted with the so-called rule of "equitable division."

The fourth contention of the defendants, in their application for rehearing, raises the only question of law that is involved in their application. As here indicated that question of law is stated by the defendants, in their petition for rehearing, as follows:

> "In rendering its decision the Court failed to apply the doctrine of 'equitable apportionment' as defined in the case of Kansas v. Colorado.'
>
> See Application p. 9.

At another place in the Application the defendants state

> "It is laid down in Kansas v. Colorado that the proper rule to be applied in case of an interstate stream is that of equitable apportionment of benefits between states involved."
>
> (Petition, p. 11)

Again, the petition for rehearing used this language

> "If it can be that the degree of sovereignty possessed by a state is not sufficient to authorize the state to create in favor of its citizens water rights calling for all of the water contributed by the state to the interstate stream, then we wish to develop for the consideration of the Court the alternate rule of 'equitable division' laid down in Kansas v. Colorado."
>
> (Petition for rehearing, p. 12)

We shall not undertake to take up in detail the contentions of the defendants and their various argu-

ments upon what they assume to be some rule of "equitable division." We shall, however, later herein, take up what seems to us to be the rule as laid down in Kansas vs. Colorado, and attempt to show that the defendants would gain nothing, but rather lose by the application of that rule.

Various discussions as to the rule that should be applied on an interstate stream.

The first discussion in this case on the evidence and the merits occured in December 1916. In that discussion the defendants contended broadly, as was contended in the answers, that the State of Colorado had the right to seize all waters found within her borders, regardless of the rights of others, and, when pressed upon this point, sought to claim that there was some undefined rule which allowed Colorado and her corporations and citizens, to take from the interstate stream, while it was still within her borders, all of the water without being subject to answer to any one for so taking.

This Court, after that argument of December 1916, restored the case to the docket for reargument and entered an order in relation to that re-argument which contained the following provisions:

> 1. Counsel are requested to specially direct their attention to the rule which they deem should properly be applied to a solution of the controversy for decision: That is, whether the rights asserted are to be tested and determined solely by the application of the general principles of prior appropriation, without regard to state boundaries, or whether, on the contrary, the general principles of prior appropriation are sub-

ject to be restricted or their operation limited in this case by state lines, and if so, by what principles, under that assumption, the case is to be controlled.

2. They are moreover requested not merely by generalizations to state the facts relied upon, but specifically, by careful reference to the pages of the record, and to group them under the various propositions relied upon, including the extent of the use of water in both states when the work complained of was begun and when this suit was commenced, and the extent of appropriations made or authorized in either or both states since its commencement.

The second one of these provisions might well be considered when passing upon the questions of fact as to the relative priorities of appropriations, as it indicates clearly the purpose of the Court at that time to get from counsel on both sides all possible light from the evidence on the questions of priorities. We need only say here that counsel on both sides filed new briefs and digested the evidence in relation to this second request, and that the Court has all along given these questions very full and careful consideration and that the opinion in the case, as well as the Suggestion No. 2, reveals that careful consideration, and that there is no showing now that any different result would be reached on a reconsideration of those questions of priorities.

It will be noticed that the Court, in its request No. 1, as above quoted, asked counsel to give particular attention to the development of the "rule" which they deemed should properly be applied to a solution of the controversy for decision.

In response to this request of the Court counsel for the defendants filed elaborate briefs discussing the

rule, and citing authorities, and counsel for the complainant likewise filed their briefs upon the same matter of the rule that should be applied.

In other words, at this stage of the case, before the second argument on the evidence and the merits, the Court and counsel were bending every effort to the serious consideration of the question of the rule that should be applied.

Argument of 1918.

In January of 1918 this cause came on for the second argument upon the evidence and the merits, and this was after the filing of the supplemental briefs taking up the question of the rule that should be applied in response to the request of the Court made after the argument of 1916.

The earnestness of the Court in searching for the proper rule to be applied is manifest from the colloquies that occurred during the arguments of the case. For present purposes we will not lengthen this brief by reference to any colloquies or arguments there presented on behalf of the complainant, but confine ourselves to the matters occuring during the arguments made for the defendants. All of these arguments were taken down and transcribed. The following very interesting colloquies occurred during the arguments of counsel for the defendants at that argument in January, 1918.

From the argument of Mr. Rogers for the defendants.

> 'You asked for a rule. When you had the former argument, you asked for a rule by which to determine this. I know of no one who can furnish that rule out of hand. You may evolve

it after you have become familiar with all the conditions and the facts and circumstances which surround all the problems presented. It may be that you will evolve a rule. But for me, I have one rule, and that is the rule laid down by the Constitution, the laws and the decisions of the courts of Colorado; that Colorado, by virtue of her position, based not merely upon the fact that she is a sovereign state, but based upon economic laws, has a right to the use of all the waters of the streams flowing through that state necessary to the reclamation of her lands. The surrounding states have whatever comes down to those states, but with no right to inject themselves into the State of Colorado to say "You shall not use this water for your purposes, but must let it come down for our purposes."

Mr. Justice McKenna: Do you mean by that you can stop it all and use it all?

Mr. Rogers: If we could. I take the bold proposition, as stated by the laws—

Mr. Justice McKenna: (interposing) I am only asking the question to develop your thought,

Mr. Rogers: I do not want any mistaking my position in this case, because this Court asked me that question in the Kansas-Colorado case, and I give the same answer today, with more confidence than I gave it then, that there is only one practical rule, and I challenge anyone to suggest any other solution of the problem, that is, the state that by virtue of its position is enabled to, may use it to the extent of its necessities. That is a rule which has a common law basis. I do not mean to go into that phase of it now, but it has a common law basis, because if you want to apply the principles of the common law, which, to my mind, are not entirely applicable—although you can apply to the reason of the common law,—

the upper appropriator on the river uses the water to the extent that the common law permits. There are certain uses which are supposed to be reasonable uses, uses commensurate with necessities.

Then you pass to the next owner in order. There is a diminution of the water before it gets to the next owner, in order. He takes it, or whatever is left. He uses it according to his necessities, and then it passes on to the third, with the diminution that has taken place by the two upper appropriators, and he uses it according to his necessities. If it should occur, even under the common law doctrine, that the upper owners should use it all, the lower ones must suffer the consequences.

Mr. Justice McKenna: Suppose the lower owner is disposed to fight, as Mr. Carpenter indicated?

Mr. Rogers: Then he would break down the law. I am speaking about the law. You were speaking about force.

Mr. Justice McKenna: You made the observation, and based on it something of a rule as to what this Court ought to do.

Mr. Rogers: I am not going to tell this Court what it ought to do.

Mr. Justice McKenna: Maybe not what it ought to do, but what the Court in exercising its jurisdiction ought to do.

* * * * *

Mr. Rogers: Are you going to say, "Well, you may take up to a certain point and then let it go down to lower users." But up to what point? Who can say.

Mr. Justice Pitney: Your plan is to apply the doctrine that might makes right, that everything

they can do they may do? Is that your proposition?

Mr. Rogers: No. I do not like the introduction of the words that "might makes right." I would rather say that reason makes right.

Mr. Justice Day: The sovereign authority makes the right, as I understand it.

Mr. Rogers: The sovereign authority simply responds to a law of nature. And that is all there is in this whole doctrine of appropriation for beneficial uses. It is the necessary and absolute response. It is not an artificial creation. We do not take water for irrigation out of any mere matter that is put down in print. We take it because the Almighty has said to us "You cannot live on these barren lands unless you put water on them."

Mr. Justice McKenna: But he has said to us, "You are the first one that nature has favored with opportunity for using the water."

Mr. Justice Pitney: That is the might making the right.

Mr. Rogers: If you prefer to use that phrase "might making the right," you can apply that in all the relations of life. That is the reason that one man has a better position than another, because he has the power to get there."

From the argument of Mr. Farrar, for the defendants.

Mr. Justice Pitney: What I am trying to get at is this: If you are going to apply the law of appropriation, there must be some way irrespective of State adjudication for us to determine it. By what sort of principle are we going to get both States upon an equal footing if we are going to regard it from the standpoint of that appropriation?

Mr. Farrar: I can answer that only by saying it does not lend itself to that treatment; it cannot be done. The system of irrigation does not lend itself to academic treatment, to get down to a definite question. I am sorry I cannot answer your Honor more specifically.

From the argument of Mr. Carpenter.

Mr. Carpenter: It falls to my lot, Your Honors, to attempt, as best I can in my brief time, to speak to those questions propounded by the Court in the order for re-argument, with regard to the principle of prior appropriations, whether it is intrastate or interstate in its application; and if not interstate, what rule shall apply?

The Chief Justice: You really mean what rule shall be applied if the rule of prior appropriations is not applied?

Mr. Carpenter: Yes, Your Honor.

At the outset, for fear that time will too much limit me, I may state that it is our contention that the rule of prior appropriation, carrying, as it does, in each of the States of the arid West, unlike in its application in each thereof, is a rule of local law intrastate in its applications and is a rule of private property only. Also, that this rule of appropriation is not one of interstate law and that it is inapplicable to the settlement of all controversies between States.

In part, it may be said that this rule is not applicable between States for the reason that it violates the fundamental doctrine that each State of the Union has a right to depend upon her own resources for her growth and development, and cannot be hampered therein by servitudes and restrictions from without.

Mr. Justice Reynolds: I do not know what you mean by that.

Mr. Carpenter: I shall try to make it a little plainer as I proceed.

Second, that to apply the rule would be to leave the fate of each arid State and its destiny purely to the accident of first development.

Again, that to apply the rule to interstate controversies would be to impose upon one State, and the water and natural resources thereof, a perpetual servitude for the benefit of another State without the will or consent of the former.

Again, that the determination of prior appropriation, if applied without regard to State lines, would be inequitable and incapable of administration, for the various reasons which I shall attempt to assign.

Again, that the doctrine would be inapplicable because it would be impossible of administration.

And, finally, in each controversy, which must come before this Court, or before any tribunal, the facts must inevitably so vary, the conditions must be so dissimilar, and each controversy must stand upon its own set of facts, and no hard and fast rule can be made which will govern each and every controversy that must here be presented between States. At the outset, Your Honors—

The Chief Justice: (Interposing). I do not want to interrupt you, but as I understand you now, you do not propose to stop at destruction of the theory advanced in behalf of the other side, but when you get through destroying, you will build up some structure which you think should govern? You think there is no rule governing between States?

Mr. Carpenter: I think there is no hard and fast—

The Chief Justice: (Interposing.) When you say "hard and fast," I do not know what you mean.

Mr. Carpenter: No one rule. It is our contention that no one rule of law can apply to the

settlement of controversies between States over rivers.

The Chief Justice: Does that mean that no rule of law applies, or that there is a collection of rules that apply, and therefore there is some rule provided you can make that collection? I beg your pardon for interrupting.

Mr. Carpenter: There would be a collection of rules, to use your term, varying with each condition that is confronting the Court.

Mr. Justice Reynolds: No underlying principle upon which it can be determined? I cannot get any notion of your idea upon that point. I may understand it as you proceed.

Mr. Carpenter: Regarding the rule of priority, if I may go back a few minutes and trace this rule and its origin, it may aid us somewhat in following my argument.

I take it to be an elementary rule that this Government, made up of thirteen original States, was originally composed, if you please, of a Union of thirteen independent nations. Questions between nations, by the way, would be settled as international questions or one of policy. The union was formed, and new territory—

The Chief Justice: (Interposing.) That never was the case, you know.

Mr. Carpenter: I understand, but in the eyes of the law they were practically independent nations.

The Chief Justice: You state controversies between nations were settled by rule. That never was the case.

Mr. Carpenter: You mean in these United States?

The Chief Justice: Yes. When you speak of the thirteen original States, I am following you with reference to those States.

Mr. Carpenter: I meant that if they were independent nations, controversies over rivers would be settled as matters of policy and not necessarily of internation law.

These States took unto themselves a trust, in the North in the form of the Northwest territory, with the full understanding that that territory should be created into new States with exactly the same powers as the orginal, no greater and no less — not a grant of powers, but a stepping in of each State into its place in the Union, complete, clothed with all the powers of the original States.

* * * * *

So as between these States, they can still treat, or they may still treat, permission having been obtained, as Mexico and the United States treated, and their matters be settled as matters of interstate policy, governed by the conditions which confront each commission appointed and sitting for the purpose of arriving at that treaty.

Mr. Justice Day: Suppose you could not arbitrate in that way?

Mr. Carpenter: Then they must come here.

Mr. Justice Day: You must come to what they came to under the confederation or to the shedding of blood.

Mr. Carpenter: Yes, sir — but we could not do that. We would have to come here.

Mr. Justice Holmes: I do not understand you are denying the jurisdiction of this Court to decide these cases?

Mr. Carpenter: Not at all.

Mr. Justice Holmes: But the wisest way of doing this would be in the first place, to make a treaty, subject always to ultimately coming here.

The Chief Justice: I understood the contention to be that this is not a subject matter of judicial action.

Mr. Carpenter: Oh, I beg your pardon, no, no.

The Chief Justice: I do not see how it could be the subject of judicial action, if, under your statement, the right of each State is supreme to do it within its own borders, and that others cannot interfere.

Mr. Carpenter: Undoubtedly, Your Honor, this Court sits and has jurisdiction in these cases as would a Court of International Arbitration between nations —

The Chief Justice: (Interposing.) I do not agree with you.

Mr. Carpenter: (Continuing.) —which nations in turn had agreed to surrender to that Court the power of adjusting their differences and had surrendered the right to go to war.

The Chief Justice: I cannot agree that this Court is an arbitrator, because that would not be a judicial power. That would be excluding the judicial power.

Mr. Carpenter: I said assuming that a Court of International Law had power to enforce its decrees.

Mr. Justice McKenna: Of course, if the respective States have rights which should be considered between themselves, neither one could have absolutely a rule which should be applicable to the other. There must be some principle to determine these matters.

Mr. Carpenter: The contention that would be presented tomorrow in another case would involve conditions very materially different, probably, from those presented by us today.

Mr. Justice Brandeis: Is there any significance to be given to the fact that both of these States have been carved out of territory which belonged to the United States?

Mr. Carpenter: None, as I take it, Your Honor, at all, because each of these States came into the Union on an exact equality with Maine, Massachusetts, New Jersey, or any of the original States.

Mr. Justice Brandeis: If you drive that principle of exact equality, which I supposed related to political power and not to property rights primarily, you would be confronted with the fact that in all the thirteen States your rule of riparian ownership applied.

Mr. Carpenter: Yes.

Mr. Justice Brandeis: I do not know but what you would be worse off under that rule than you would under the rule of priority.

Mr. Carpenter: That was the rule of local law, and if your Honor recalls, the Courts of those States have decided that the easements in the streams created by those rights have no extra-territorial operation except by consent. It was decided in Massachusetts by the Supreme Court, if I recall, that it would have to be assumed that the upper State consented before an easement upon this stream could be impressed and enforced in behalf of a riparian owner in a lower State.

Mr. Justice Brandeis: And what was the ultimate decision?

Mr. Carpenter: I do not now recall.

Mr. Justice Reynolds: Let us consider this case: The Tennessee River flows clear across Tennessee and then clear across the State of Kentucky. Under that rule, could the State of Tennessee turn that around and cut it away from the Mississippi River and cut it off entirely, if they wished to, in that way?

Mr. Carpenter: I would say, academically speaking, yes, but —

Mr. Justice McReynolds. (Interposing.) Whether that is the principle that you are advocating here, is what I would like to get at, if I can.

Mr. Carpenter: No, Your Honor, that is not the principle we are advocating — that is, in this, that so far as this case is concerned, we insist no condition has here arisen which can compel an application of any rule, because the plaintiff has not brought us to that extreme position, if you please, where, as if it were between nations, we would either have to go to war or settle. In an illustration which Your Honor uses, if the diversion of that river were to totally devastate the State below, while each of those States undoubtedly has complete dominion of property within its borders, save for navigation and other governmental functions —

Mr. Justice Holmes: (Interposing.) I do not understand that you are not bothering very much about what might be the extreme limit if you were pressed to the extreme, but saying that, so far as this case is concerned, a reasonable distribution between the two would not be reached by adopting a simple principle of priority, but some other principle must be reached, and I suppose you are content to have some principle of division arrived at short of an absolute saying that Colorado may do what she chooses?

Mr. Carpenter: Absolutely. We come here of course as litigant States recognizing the right of the other to exist but we do not believe that we have pressed them to the point of the extreme right.

Mr. Justice Day: Just what do you mean by that? Colorado is within her rights, you contend?

Mr. Carpenter: Yes.

Mr. Justice Day: Looking at it from what standpoint — obligation or right or what?

Mr. Carpenter: Colorado has made this appropriation of her natural elements within her right, and is using it for her benefit and those of her people, and in so doing has not gone so far as to destroy her neighbor, which would be the extreme case.

Mr. Justice Pitney: Do you recognize no duty on the part of Colorado to so enjoy her own natural resources as to not injure her neighbor?

Mr. Carpenter: I would not say so as not to injure. Some injury must result necessarily. But use so as not to unreasonably injure her neighbor.

Mr. Justice Brandeis: Do you mean, there not being enough for both, there must be a fair division, considering the water which is also available to Wyoming from other sources — I mean in this valley?

Mr. Carpenter: Do you mean as far as this particular case is concerned?

Mr. Justice Brandeis: That is the only case that is before us.

Mr. Carpenter: I do not think it has arrived at the point of a fair division. I feel that the small part of our own water that we are taking is so small compared with the sum total of this river, a large part of which we contribute to Wyoming, that we are not driven to the point of a division at all.

* * * * *

Mr. Justice Day: You say the other theory will not work. Those who have the duty of deciding the case must have some theory for it. What rule would you lay down to guide the Court in determining a matter of this kind?

Mr. Carpenter: I would say this, as I said at the outset, that no rule can be announced definitely that must determine every case; but I would say in this case, Your Honor, the evidence fails to show that Colorado, in the use of her natural resources within her borders, has unreasonably or unduly, in that exercise of her sovereign right, invaded or injured the neighboring State.

Mr. Justice Day: That is nothing more than saying she took her portion of the water in a common river.

Mr. Carpenter: Yes.

The Chief Justice: I am not, of course, expressing any opinion about what ought to be applied in this case, because I do not know, but there is a duty on me to apply something.

Mr. Carpenter: Certainly.

The Chief Justice: I do not agree with your premise that there ever was a time in the history of this country where the states, to use your word "sovereign," had the power which you assume they had. I do not think they ever had it. They did not have it in colonial times. They did not have it under the confederation, and the Constitution put in a provision which took it away from them under the Constitution by making certain questions judicial questions. There are of course some cases in Colonial times where there were differences between these States, and the Privy Council acted and determined what were their rights, and involving things more intimate than this water. In the Confederation they put an express article, in the Articles of Confederation, providing for suits and how they should be determined. When they came to create the Constitution of the United States, they put in the judicial power. I do not see your premise of sovereignty. The right of a sovereign may be

the criterion by which, under the power conveyed, we have to determine a question. I am not saying it is not; I do not know. I am looking for light on that subject. But I am combatting any proposition which holds that the sovereign right gives them power to do something which is incompatible with the rights of the other under the law which governs the relations of sovereigns as between themselves; because I think the colonies and the Confederation and the Constitution of the United States have provided for action on those subjects; I cannot follow you in the premise you offer, — as I think you offer it. I may be entirely mistaken. I am not saying that Colorado ought not to have all the water. I am not expressing any opinion on that.

Mr. Carpenter: I understand, Your Honor.

Naturally I have been following in my statement, probably unconsciously, the language of the decisions of this Court in the many cases which we have cited in the briefs as to the attribute rights of States, their sovereign rights, and their relations one with another.

* * * * *

Mr. Justice Pitney: What weight do you give to the circumstance that the general principle of prior appropriation of water, irrespective of administering the right, was adopted by common consent in that arid country, obtaining in each of the States, and adopted because by common consent, it was deemed that it would best contribute to build up the country and the States according to the rights of the States and of the parties that went there to make American communities there and to build them up?

Mr. Carpenter: Does Your Honor mean by common consent of the States themselves?

Mr. Justice Pitney: Of course, they made the rule of conduct, the rule of life, the rule of principle, themselves.

Mr. Carpenter: Yes, the people within each State made the rule.

Mr. Justice Pitney: The States agreed one with the other.

Mr. Carpenter: Oh, no sir.

Mr. Justice Pitney: Didn't they, in general principle? Didn't they agree on general principle how it shall be administered?

Mr. Carpenter: No sir, they varied.

Mr. Justice Pitney: In what respect?

Mr. Carpenter: Along the border States of California, and Oregon, and Washington, both rules of riparian rights and appropriations obtained. In Nebraska, partly an arid State and partly a humid State, both rights obtained, and in Kansas the same. Colorado is wholly arid, but she adjoins Nebraska and she adjoins Kansas. There is no common consent and the rule is not commonly adopted by consent among the States acting together.

Mr. Justice Day: Is not Wyoming an arid State?

Mr. Carpenter: Yes.

Mr. Justice Day: And Colorado the same?

Mr. Carpenter: Yes.

Mr. Justice Day: Are not their systems of distribution practically the same?

Mr. Carpenter: No sir, they are not.

Mrs. Justice Day: Radically different?

Mr. Carpenter: I probably speak too hastily. In general, they are the same, they vary greatly in detail.

Mr. Justice Pitney: When were these early acts of Congress passed with reference to this question?

Mr. Carpenter: The acts of 1866 and the acts of 1870 were both enacted before Colorado was admitted to the Union. But those acts apply to local divisions and to local law.—

Mr. Justice Pitney: What effect the local laws have is another question. The two States virtually have been brought up from the beginning under the principle of appropriation.

* * * * *

Mr. Carpenter: To attempt to apply this doctrine between two States, would mean, as for example here, that Wyoming would say, "We have already appropriated this river." Assume, for the purpose of argument, that her prior appropriations, when all were drawing at their maximum, were adequate, or were of such magnitude, that they would consume the river. That does not mean that that condition obtains constantly. That is merely the maximum, and there are times, not very many, when right in the midst of the summer or at other seasons when the demand is so little because the necessity is so great, that water would go wasting. So even if she did have prior appropriation and this were to be decided on the question of priority, the rights between the parties would simply be these — the right of upper tunnel to divert only when there was no necessity upon the part of the prior appropriations below, and what the necessity would be is a question of fact to be determined every hour of the day, and cannot be determined by any given fixed quantity. On the other hand, were that not true, the necessities not existing for the older appropriations in Wyoming, if the upper were forced to pass the water down, then it would be taken by these junior to the upper project, because the water which has once passed the upper is gone forever.

So that in order to balance up, or rather in order to administer priority regardless of State

lines, would require not only the general uniform policing responsive to a common source and responsive to the immediate demands and injuries of the local parties, but more than that, must operate under one system of law throughout.

* * * * *

From the argument of Mr. Solicitor General Davis in 1918, on behalf of the Government, the following matters are taken:

> Mr. Solicitor General Davis: If Colorado came into the union taking title to these innavigable waters, she took what none of the States of the original sisterhood ever hoped or pretended to enjoy; so that, so far from that doctrine producing equality, it produces upon its face inequality of the most transparent sort.
>
> As I say, the United States is not concerned in the particular outcome of this controversy. If this rule were applied to the instant case, we are not prepared to say what the result would be. We are not prepared to say whether Wyoming is suffering from this action of Colorado, whether this water which Colorado proposes to divert may be taken without burdening the citizens of Wyoming. All we say is this, that all rights on this Laramie River from its source in the mountains to its mouth on the Platte are still acquired from the United States. That they are entitled to respect in the order of their acquisition; although that acquisition may have been procured or conducted in conformity with State law by State filings or State license or what not, yet as to that the State was simply functioning as an agent of the Federal Government; that having so taken their rights from this common source, they are to be respected in the order in which they were taken and in which they vested. If it shall appear from the evidence that rights so vested in Wyoming

before this diversion was attempted in Colorado will be injured by the diversion, the diversion to that extent should be enjoined. If those senior rights will not be so injured, then, under the rule which we propose, the bill would be dismissed.

Mr. Justice McReynolds: How would you work out that rule practically to apply to this case?

Mr. Davis: That is a question I just now undertook to answer.

Mr. Justice McReynolds: How shall we ascertain whether they are injured?

Mr. Davis: That is simply a question of evidence, of course. That is to be determined by ascertaining the flow of the stream, by ascertaining the extent of the original appropriation. Here we have A. in Wyoming. "What have you?" "I have an appropriation right." "When?" "We have this date." "How much?" "We have this quantity." And so on with B., C., D., and E.

The next argument on the evidence and the merits took place in January 1922, and the care and attention that the Court was still giving to the question here sought to be raised anew, is illustrated by colloquies occuring between the members of the Court and counsel discussing the questions involved on behalf of the defendants at that hearing.

These colloquies upon this matter in 1922 were as follows:

From the argument of Mr. Keyes, Attorney General of the State of Colorado.

Mr. Justice Pitney: When was Colorado admitted as a State?

Mr. Keyes: In 1876.

Mr. Justice Pitney: What effect do you think the Act of Congress passed about ten years earlier with respect to public lands has upon it?

Mr. Keyes: We do not think that would have any effect upon it, because we think that Colorado was admitted into the Union upon the same basis as all the other States, and that the waters of the streams became State property when we were admitted.

Mr. Justice Pitney: How do you maintain that the waters of all other States were for the use only of the State in which they arose? I do not understand that that is the law of the land.

Mr. Keyes: Yes; I think there are numerous cases holding that the waters of a State, at least so far as intrastate streams are concerned, are the waters of the State itself and can be used by the State as it pleases.

Mr. Justice Pitney: I thought I had heard and seen cases in State Courts, both the State and Federal Courts, where the case as between upper and lower owners related to water that crossed the boundary, and where the law of appropriation was applied without any regard to any State line.

Mr. Keyes: There are no cases, so far as I am aware, in which there has been a controversy between two sovereign States.

Mr. Justice Pitney: Of course not. The question is, how do you get the sovereign State superior to the law of the land? That is what I am inquiring about.

Mr. Keyes: In the two or three cases that have been decided in the courts, the court has expressly said and expressly intimated that a question might be involved as to the state itself. We claim that Colorado is a sovereign State, that the waters of its natural streams belong to it, the same as the waters of the natural streams of

the original thirteen States; that we have control and jurisdiction of the waters of the streams. In one or two cases in connection with upper and lower appropriations, where it was assumed that the States were willlng, I think they have applied that, but they have expressly said that where the State itself was a party, and here in Colorado, according to our constitution itself, the waters of our natural streams belong to the State, the same as if were admitted into the Union with the original thirteen States.

Mr. Justice McReynolds. What is the rule in your State as to how waters shall be appropriated as between the various takers? One man takes it in the year 1900, another in 1901 and another in 1902. Under your rule how would that water be appropriated in seasons of scarcity?

Mr. Keyes: It would go, in seasons of scarcity, so far as intrastate matters are concerned, to the prior appropriator.

Mr. Justice McReynolds: You are not willing to apply that rule to your neighbor?

Mr. Keyes: No, we think that does not apply between States.

Mr. Justice McReynolds: Why?

Mr. Keyes: There are many reasons. The first is that we claim that the rule between sovereign States is an entirely different rule than should be applied between individuals; that the sovereign State being a party has a right to use its waters so long as it at least does not unreasonably exercise its sovereignty. For instance, in the Kansas-Colorado case it was said, can we not assume that in using these waters Colorado has not unreasonably exercised its sovereignty?

We think an entirely different position should apply where the State itself is a party. I think there always has been that distinction and that difference.

From the argument of Mr. Carpenter.

Mr. Justice Day: You mean to treat the States as independent sovereigns, just as independent nations would be?

Mr. Carpenter: For the purpose of these disputes, that is our position.

Mr. Justice McKenna: Do you assign to the State which is the source of the river all the river, notwithstanding all its accumulation in volume during its course?

Mr. Carpenter: Technically speaking, Your Honor, if we were to apply the rule of international law the State would be entitled to the absolute dominion and use of the entire river.

Mr. Justice McKenna: That is, according to the authorities you have quoted.

Mr. Carpenter: Yes, sir. But there, as here, it becomes one of policy, first, between the States, which may, and should be, as some of us believe, settled amicably between those States by interstate compact, consent of Congress having been obtained, or their subsequent approval; and failing in this, then if we were to consume the entire stream, and utterly devastate a country, which would, if you please, be a sufficient cause for war under the law of nations, then we are brought to the bar of this Court, and then the question in any case of this kind, we contend, is not what use have the private citizens made, but rather, has the upper State, under all the facts of the case, including all the conditions, present and prospective, after all, unreasonably exercised her sovereignty? * * *

The Chief Justice: How far does that help you? You have still got the standard of unreasonable use and sovereignty. What is it?

Mr. Carpenter: Certainly it is a question of fact.

The Chief Justice: It is a question of fact?

Mr. Carpenter: It is a question of fact, to depend entirely upon the facts of each particular river under consideration. Conditions might vary greatly. Conditions on one river might be the direct contrast of conditions upon another river. Conditions upon a river in one section of the country might be the direct contrast of conditions upon a river in another section of the United States.

Second, conditions of local law vary with each State. I know of no two States, I am free to say, in the Union — I should say in the West, of the appropriation States, so-called, for example, whose laws are identical or whose methods of handling and controlling the streams are the same. Each condition calls for its own rule.

The Chief Justice: Then, you leave it to the arbitrary discretion of the tribunal that has to act on it?

Mr. Carpenter: I would not say "arbitrary". I would say "judicial" discretion of a tribunal.

The Chief Justice: It is based on some rule, is it not?

Mr. Carpenter: There is no rule. You cannot, frankly — and I do not say this to be impertinent — but I really feel there is no set rule, and can be no set rule, except that which I have stated, that it is a question of interest between States, has the upper State, in view of all the facts of the particular case presented, unreasonably exercised its sovereignty? I think this question of the unreasonable exercise is one of fact.

Mr. Justice McKenna: When you say there is no set rule, do you mean that as a declaration of principle as to appropriation or riparian rights, or something or other?

Mr. Carpenter: I most certainly do. I most certainly contend, your Honor, that neither the rule of priority of appropriations nor the rule of riparian rights has any place in the final determination of rights between States.

Mr. Justice McKenna: What other rule would you make?

Mr. Carpenter: I would make this, and this is the only rule, it seems, could be applied.

The Chief Justice: That is not any rule at all, is it?

Mr. Carpenter: You applied it in the case of Kansas vs. Colorado, and, as I understand, that is the decision of that case. A similar rule is likewise, as we understand, applied in the case of Missouri vs. Illinois.

The Chief Justice: In one of those cases — it may have been the Kansas case — there was the statement that what this Court ought to do is to build up an interstate common law. That seems a laying down of principles, does it not?

Mr. Carpenter: Yes; but, your Honor, you certainly would not wish, if I might answer indirectly, to lay down a principle of law, that could not apply all over the country.

The Chief Justice: That is a different proposition.

Mr. Carpenter: And the conditions of local law vary with local conditions.

Mr. Justice Holmes: This seems to be rather a dispute about words. Of course, the principle, whatever it is, would be a principle of law. The scope of it will be determined as successive decisions gradually work it out.

Mr. Carpenter: Yes, sir; it is a matter of evolution entirely, as internation law has been a matter of evolution.

The Chief Justice: But there must be some principles about it, and some rules.

Mr. Carpenter: Yes.

The Chief Justice: I understand you to say there are no rules.

Mr. Carpenter: Of international law.

The Chief Justice: No, but I mean here.

Mr. Carpenter: I did not mean that. No, there is no yard stick rule, in that sense. There is no definite rule like priority of appropriations, which is a rule of accident, largely, and a rule of contest of speed. There is no such thing as the lower nation wholly depriving an upper nation of the use of waters of the streams because of riparian right principles. These details of local law may justly enter into a consideration of the broader facts surrounding an interstate river.

The Chief Justice: Can they not form the basis of an analogous rule?

Mr. Carpenter: They may if that analogous rule could apply.

The Chief Justice: If you could qualify it to meet the change in the genral situation?

Mr. Carpenter: Yes, if you could, your Honor; but frankly, hardly two rivers of the country can be governed by the same rule.

Mr. Justice Brandeis: Is not reasonable use a rule, just as well as reasonable care is a rule?

Mr. Carpenter: That is as we take it.

Mr. Justice Brandeis: And that is not a matter of discretion. A Court, in passing upon whether a person has exercised reasonable care or made a reasonable use of an article, is not exercising discretion at all. It is applying a rule.

Mr. Carpenter: That is true.

Mr. Justice Holmes: And, in the case of reasonable care, successive decisions withdraw successive cases from the vague inquiry, and make them more and more specific. It gradually renders itself definite.

The Chief Justice: Until you get a standard.

Mr. Carpenter: Until you finally get a standard.

The Chief Justice: Until you finally get a rule.

Mr. Carpenter: Finally. But our interstate water law, if I may state it, is in the formative stages, ultimately, we hope, leading to some rule.

Mr. Justice McKenna: But you have to deal with the present. How long would you have to wait for the evolution of the rule? We cannot leave it to future generations, to see what they are going to do about this situation. We have got to deal with it now.

We do not see how it would be possible for this Court more sharply to call the attention of counsel to the question now sought to be raised as to the applicable rule than was done by this Court in the instant case. We do not see how it would be possible for the Court to strive more earnestly to find every possible suggestion and reason from the learning and diligence of the eminent counsel who represented the defendants than was done, and were this all we think it would fully answer the application for a rehearing. The defendants have already given to the Court, at its earnest request and upon its earnest insistence every possible aid that they have been able to give the Court upon this direct question of the rule that should be applied. There was no omission by the Court to study this question; there was no failure of the Court in giving

its attention to it; there was no oversight. The question here was not in the least lost sight of, but it was present very pronimently through all of the discussions of the Court, and, being so present, was given very careful attention at the final hearing. These matters alone are held perhaps universally sufficient reason for denying rehearing in any case on any matter so thoroughly considered.

The rule of "equitable division" as applied in the case of Kansas v. Colorado, would not aid the defendants.

To us it seems entirely clear that the defendants have mistaken the point decided in the case of Kansas vs. Colorado. In that case there was no question of diversion beyond the water-shed. All of the lands involved were riparian lands. The State of Colorado, in its answer, and even more fully in its briefs in that case, took pains to point out specifically the fact that the lands involved in Colorado, as well as those involved in Kansas, were riparian lands. This was in answer to a single charge in the bill of complaint that the waters diverted were "actually applied to these dry, barren, arid, non-riparian and non-saturated lands in the State of Colorado."

Questions of prior appropriation were sought to be introduced in the case. In fact, they were not much considered in the case, and the question was negatively decided against Kansas on the principles of riparian rights. We shall show later what we mean by "negatively."

The State of Kansas, in that case, in fact based its contentions upon the doctrine of *riparion rights* This Court finally declined to lay down any definite rule

that should apply to interstate streams in all cases. The Court found instead a solution of the controversy then before the Court in the very doctrine of riparian rights which was being urged by the State of Kansas as the just doctrine. In considering this doctrine of riparian rights, which the State of Kansas has held and was holding to be a just and equitable rule governing the rights of riparian proprietors on a stream, this Court found that it was not true in Kansas, not true under the rule which that State administered, that the waters of a stream must be left to flow down in full and undiminished volume to each lower proprietor. On the contrary the State of Kansas held it just that under the doctrine of riparian rights "a portion of the water of a stream may be used for the purpose of irrigating land * * * yet a proprietor cannot under color of that right, or for the purpose of irrigating his own land, wholly obstruct or divert the watercourse or take such an unreasonable quantity of water, or make such unreasonable use of it as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably." This Kansas doctrine was taken from the case of Clark vs. Allaman, 71 Kan. 206, and large quotations were made by this Court in the Kansas-Colorado case from that Kansas case. Moreover, the Kansas case of Clark vs. Allaman itself quoted similar observations from the opinion of Chief Justice Shaw in the case of Elliott vs. Pittsburgh Railroad Co. 10 Cush. 191, 193, 196. Among the words quoted from Chief Justice Shaw by the Kansas case are the following:

> The right of flowing water is now well settled to be a right incident to property in the land. It is a right *publici juris* of such a character that whilst it is common and equal to all through

> whose land it runs, and none can abstract or divert it, yet, as one of the beneficial gifts of providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down.

This Court then, in discussing the evidence, found that Colorado was a riparian proprietor, that the lands on which it used the waters of the upper river were riparian lands, that under the circumstances Kansas could not enforce against Colorado a rule of riparian rights stronger than the rule which she herself laid down as just in contests between her own citizens; she could not be heard to claim that the rule of "equitable division" between riparian proprietors was an unjust rule. The Court upon that point uses this language:

> As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the *riparian* proprietors, she cannot complain if the same rule is administered between herself and a sister state. (Italics ours)
>
> (206 U. S. 104)

In other words, the very doctrine which Kansas laid down as just, was applied in her own case. The Supreme Court in fact say to Kansas,

> You cannot, in this Court, insist that the just doctrine in ascertaining rights between riparian proprietors, when those proprietors are states, is stronger in your favor than the doctrine which you have established as just between your citizens who are riparian proprietors.

Thus it is that in that case the Court did not affirmatively establish any rule as between neighboring states — at least no rule of general application. But it did, by negation, deny to Kansas rights greater than those which she established as just, between her citizens, and said as to Kansas, "she cannot complain if the same rule is administered between herself and a sister state."

The rule of "equitable division," therefore, as applied, not positively, it is true, but negatively, as we have indicated in the case of Kansas v. Colorado, is not a rule which permits *non-riparian* proprietors to divert the waters of a stream to *non-riparian* lands. It is merely the doctrine of the rights of riparian proprietors, and defines those rights as they are defined in Massachusetts and Kansas and certain others of the states.

This Court did not find or apply in the Kansas case any *new rule* for dividing waters between States either equitable or otherwise—did not hint that rights between States were to be determined by any different rule from that applied between individual neighbors.

Before the defendants can appeal to the doctrine of "equitable division," as applied in the Kansas case, therefore, they must confine their use of the waters to *riparian* lands.

No lengthy discussion is needed, nor lengthy citation of authorities, to show that the defendants under any doctrine of riparian right would not be allowed to take even the 15,500 acre feet which the decree permits, and divert the same through the tunnel into the water-shed of the Poudre, where no part of the waters can ever return to the Laramie River. A single quotation will suffice:

> As we have seen in a previous portion of this work, lands, in order to be riparian, must border

or touch upon the water of a stream or other body of water. In other words, the riparian owner must own the bank in order for his lands to be riparian. This principle is also adhered to in the Western States which follow the common law and allow a liberal use of the waters of the natural streams for irrigation. The question now arises, as to how far back from the stream the lands may lie, so that they may be irrigated as a riparian right, under the Western American construction of the common law. Upon this subject the States in question have adopted practically the same rule. For the present we will disregard the question of title, and discuss the question from the standpoint of the watershed. The great weight of authority in these States holds that land in order to be riparian, and hence entitled to be irrigated as a riparian right, should lie within the drainage basin or watershed of the stream to which the riparian rights are claimed. This is so for the reason that, as soon as the land passed over the ridge or "divide" separating its drainage basin from another, it became tributary to another stream; and, therefore, if it touches this stream, it is riparian to it; if it touches no stream, it is not riparian land. So, if a divide cuts in two a tract of land held under one ownership, that portion only which lies within the drainage basin of the stream may rightfully be irrigated.

If we are to adhere to the principles of the common law, this rule is undoubtedly the correct one. We have seen in previous sections, that the use of the water for irrigation must be a reasonable one. We will also see in a subsequent section that after its use all water not actually consumed must be returned to the natural stream, for a like use by the other riparian proprietors below. Now to run the water by means of tunnels, or otherwise, under the divide to another watershed, so that both the percolation and the surplus could not be returned to the stream from which it was

taken, but would flow to another stream, would be a most unreasonable use of the water, when taking into consideration the rights of the other proprietors on the first stream, and would also give to the proprietors on the second stream water to which they were not entitled.

(Kinney on Water Rights, 2nd Ed., Vol. I, p. 892, Sec. 514)

We submit,

1st. The Court, under the pleadings, and the evidence, was not called upon to enjoin the diversion of Sand Creek, and there was nothing in the case which required the Court to say that such a diversion could not be enjoined.

2nd. The facts as to the priorities of the diversions by the complainant, as compared with those by the defendants, were fully—even exhaustively considered by this Court, and its conclusions are fully sustained by the evidence, and that evidence, when taken altogether, would not have supported any other finding than that made.

3rd. The Court's decision as to the question of costs was not only within the discretion of the Court, but was a proper disposition of the matter of costs.

4th. The question of law sought to be raised as to the rule that should apply here between two states, both administering the doctrine of prior appropriations,

(a) Was fully discussed by counsel both in briefs and on the oral argument;

(b) Was fully and carefully considered by the Court for several years;

(c) Has always been held to be the only just doctrine by both the States here involved;

(d) No other rule is suggested by the defendants save the Kansas-Colorado rule, which would not give defendants more water, but would take away the 15,500 acre feet allowed by the decree;

(e) The rule adopted, in view of the statutes of the United States of 1866, and following, when both states were a single arid tract, possessed by the United States and not even separated into territories, and in view of the decisions of both states as to what is just and right between man and man, is the only reasonable rule that can be adopted.

Moreover this Court could not hope to give to the question of the applicable rule more careful and exhaustive attention and consideration than that which resulted in the decision which has been rendered.

Respectfully submitted,

THE STATE OF WYOMING,

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